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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

FURTHER REPLY COMMENTS

Media Access Project, Black Citizens for a Fair Media, Center for Media Education, Minority Media and Telecommunications Council, National Association for Better Broadcasting, Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights and Women's Institute for Freedom of the Press (MAP, *et al.*) respectfully submit these *Further Reply Comments* for the purpose of addressing, in brief form, a few issues raised in comments submitted in these proceedings with respect to the Commission's proposals to revisit its attribution rules.

The comments filed in this docket amply demonstrate that the Commission must establish clear and stringent tests for defining ownership. This reply is largely directed to one relationship which is especially susceptible to abuse, that of programmers who hold financial interests in broadcast stations.

Broadcasting is now able to compete as a multi-channel medium

One theme widely invoked to justify relaxed FCC ownership and attribution rules is the claimed need for broadcasters to be protected from the economic threat of new competition, especially from multi-channel video programmers. *See, e.g., Comments of NBC* at pp. 1-2, *Comments of NAB* at p. 5. MAP, *et al.* and other parties to these proceedings have amply addressed this self-serving bellyaching. *See, e.g., Reply Comments of MAP, et al.* at pp. 1-3, 8-14. The bankruptcy of this position is now definitively established since, on April 3, 1997, the FCC voted to award digital TV licenses to all broadcasters. Whatever the wisdom of providing a huge allotment of additional spectrum to incumbent broadcasters, it is indisputable that over the air broadcasters will themselves be able to compete as multi-channel providers. It is true that the competition may not be entirely fair, but that is because broadcasters have a special advantage. Unlike most of their competitors, broadcasters will not have to pay franchise or license fees for the use of the public's rights of way - in this case, spectrum.

Programmers can, and have, used their clout to obtain dominion over licenses

A number of broadcast industry parties credulously argue that very substantial lenders and stakeholders have no motivation to influence a licensee's programming. ABC insists, for example, that "[w]hen a station freely chooses to obtain programming from outside sources, it is not abdicating control over programming." *Comments of ABC,* at p. 6 It says that "A party's status as station's program supplier pursuant to an arm's length contractual arrangement does not give the party control over the station's core operations." *Id.*, at p. 5. HSN, Inc., argues in a similar vein, that because of the "growing number of competing program suppliers, local stations may have more leverage than their program suppliers." *Comments of HSN, at* p. 13

These protestations do not comport with logic, or with history. The comments of Viacom, Inc., are far more credible. Viacom, which is itself a major programmer and the licensee of ten TV stations, speaks from experience in claiming that common industry practice has been quite the contrary.[1] It cites to numerous individual cases in which large program suppliers

> held equity and/or debt interests constituting or exceeding one-third of the capitalization of the broadcast stations at issue. Yet, solely for the purposes of avoiding attribution, the investors in each case financed the stations, not in exchange for corresponding voting rights that might trigger the Commission's attribution threshhold, but, instead, in exchange for contractual rights - through corollary written or unwritten agreements - that permitted them the right among other things to participate in the programming and/or related core functions of the licensee.

Comments of Viacom, 6.

As this history shows, ABC's premise is incorrect. Smaller broadcasters entering into complex financial deals with program suppliers are not, even now, capable of protecting themselves. The problem has been exacerbated by the repeal of fin-syn rules; all too often, program contracts are not arm's length arrangements. ABC's solicitude for the promotional needs of its affiliated programmer, Disney, has been well-documented in the record of this rulemaking. It is reasonable to expect that ABC would be at least half as receptive to a 50% owner.

As to HSN, it is enough to point out that its prior owner was found to have taken unauthorized control over a station in which it held a nominally passive investment. *Roy M. Speer,* FCC 96-258 (released June 14, 1996). HSN's prior management was also credibly charged with similar misconduct with respect to a second property. *See, Roy M. Speer*, 11 FCCRcd 14147, 14150 (1996).

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[1]MAP, *et al.* find much merit in Viacom's suggestion of a 10% benchmark for attribution, absent specific contractual safeguards. *Comments of Viacom,* at pp. 7-9.

The *Speer* cases are important because they illustrate the need for protective and forward looking rules which turn on the power to exercise control. MAP, *et al.* do not suggest that HSN's current management would misuse its power, but the Commission cannot adopt policies based on the presumed goodwill of its regulatees. Enforcement policies are needed not because some licensees may not be abusive, but because others may be extremely willing to misuse their clout to undermine public interest protection.

Rules which are about to be repealed offer no protection

Another of the programmers' arguments is, at least superficially, more persuasive. It is said that there are other FCC regulations which can provide adequate protection even if attribution rules are modified. Using the very same words, HSN and Fox assert that "existing regulations [the Option Time and Right to Reject Rules] already guard against concerns of undue influence by program suppliers." *Comments of HSN,* at pp. 14-15; *Comments of Fox,* at p. 6. ABC makes a similar point in saying that smaller stations' vulnerability "is tempered by the Commission's 'right-to-reject' and network representation rules,..." *Comments of ABC* at p. 6.

This argument is doubly flawed. The Commission's contract rules were never intended to substitute for more fundamental ownership provisions. More importantly, the network contract rules are facing imminent repeal. Thus, whatever benefit they might provide is extremely evanescent. The very parties now claiming that the rules are effective and necessary are among those leading the charge to repeal them. Their success seems quite certain, notwithstanding opposition from citizens and network affiliates' groups.

Programmers cannot have it both ways, and neither can the FCC. If the "right to reject," representation and option time rules are to be eliminated, they will not offer the concededly

necessary protections they provide. Even if there were merit either in loosening attribution rules or in repealing the contract rules, it is clear that repeal of one set of regulations will inevitably make subsequent repeal of the other arbitrary and capricious.

Antitrust enforcement cannot substitute for FCC oversight

Nor are broadcasters convincing in suggesting that antitrust enforcement can substitute for attribution rules. *See, e.g., Comments of HSN*, at p. 15; *Comments of Paxson Communications,* at p. 6. MAP, *et al.* surely agree that the Department of Justice and Federal Trade Commission have ample authority, and very good reason, to scrutinize the anti-competitive effects of restrictive contracts which confer excessive control, however it is described. However, such enforcement programs are not designed to address the very different statutory goal of achieving diversity in mass media voices, a task that is left to the FCC. Policies which may even be arguably pro-competitive are by no means consistent with the Commission's diversity mandate. Antitrust laws are particularly ill-suited to address vertical integration; such combinations are sometimes efficient, but First Amendment objectives often require separation of content and conduit. Moreover, unlike prophylactic rules, private and government anti-trust enforcement are often slow, cumbersome, expensive and backward-looking.

Accountabilty equals control

Finally, Paxson Communications makes two other points that must be addressed if only because of their blatant abuse of public interest standard. Paxson argues that the FCC should not attribute ownership to those who serve as "brokers" in administering the programming of stations pursuant to LMA's. It argues that since these "brokers" have entered into contracts which state they are not programmers, they should not be treated as programmers. It does not

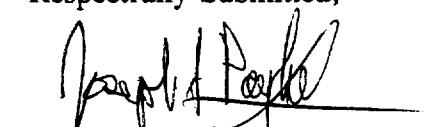
want the Commission to examine the enforceability of such contracts, or their terms, even if they, for example, would eliminate or reduce compensation if the licensee "interfered." The circularity of this is all too obvious; the very point of attribution is to look beyond the boilerplate language to determine actual indicia of control. Paxson asks what it evidently believes should be a rhetorical question - should not the Commission "also attribute ownership to the licensee" as well as the broker? Paxson does not seem to understand that the answer is "no." If the putative licensee does not program the station, but leaves it to a contractor who is not accountable to the public in exercising trusteeship duties, it is not the real licensee. If the "broker" is fulfilling these licensee functions, it is the "broker" who should be considered to be the true owner, and who should be licensed as such.

But it is another Paxson proposal that qualifies as the most egregious of all. It says that the FCC's 15% radio attribution principle should not apply to television LMA's. In radio, ownership is attributed to a non-licensee providing more than 15% of a station's programming. Paxson calls upon the FCC to rule that for TV, only *locally* produced programming should count towards the 15% limit. Paxson's reasoning is as stunning as the idea itself: since these stations are programmed little, if at all, on a local basis, but instead "rely on substantial amounts of network and syndicated programming,...the 15% standard is artificially low." *Paxson Comments* at p. 29. In other words, since the non-licensees who seek to determine programming on these stations further delegate programming authority to syndicators, they should not be accountable for the results of their efforts. This rule would certainly make Paxson's job easier, since it would not have to worry about the citizens of those communities, but it is hard to conceive a principle more incompatible with the public interest.

CONCLUSION

Wherefore, the FCC should consider the views set out herein, and grant all such other relief as may be just and proper.

Respectfully Submitted,



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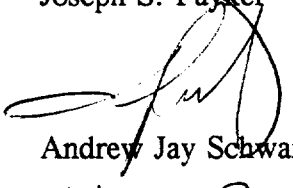

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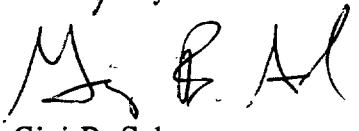

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